IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 19043 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

FATEHSINH GEMALSINH - Petitioner(s)
Versus
STATE OF GUJARAT & 8 - Respondent(s)

==========

Appearance :

MR MP SHAH for Petitioner(s) : 1,MS. KRUTI M SHAH for Petitioner(s) : 1,
MR DA DESAI ASST. GOVERNMENT PLEADER for Respondent(s) : 1,
None for Respondent(s) : 2 - 5, 5.2.2, 5.2.3, 5.2.4,5.2.5 - 6, 6.2.2,6.2.3 - 7,7.2.2
UNSERVED-EXPIRED (N) for Respondent(s) : 5 - 7.
- for Respondent(s) : 0.0.0,0.0.0

==========

CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 17/04/2006

ORAL JUDGMENT

1. By way of this petition under Articles 226 and 227 of the Constitution of India, the petitioner has challenged the legality and validity of the judgment and

order passed by the Principle Secretary (Appeals), Revenue Department, State of Gujarat dated 17-1-2005 passed in Revision Application No.52 of 1995 in dismissing the same and confirming the order passed by the Collector, Surat dated 25-4-1995 passed in RTS Appeal No.83 of 1993.

2. The land in question was originally owned by the name of Bhimlabhai Amrabhai and on 4-5-19986, he has executed Will in favour of the father of the petitioner i.e. Gemalsinh Merjibhai and necessary entry was mutated in the record of right on the basis of the aforesaid Will vide entry No.1381 dated 13-2-1988 and the said entry was cancelled by the Mamlatdar (Revenue), Olpad on 28-2-1989 by holding that such transfer has taken place without permission of the Collector, therefore, it is in violation of Section 73AA of the Bombay Land Revenue Code (for short “the Code”). Being aggrieved by the aforesaid order passed by the Mamlatdar, the petitioner preferred appeal being Appeal No.RTS/Appeal/3/92 before the Deputy Collector, Olpad and the Deputy Collector by order dated 23-2-1993 dismissed the said appeal. Being aggrieved by and dissatisfied with the same, the petitioner preferred appeal being RTS Appeal No.83 of 1993 before the

Collector, Surat and the Collector vide its judgment and order dated 25-4-1995 dismissed the said appeal. Being aggrieved by and dissatisfied with same, the petitioner preferred Revision Application No.52 of 1995 before the State of Gujarat under Section 211 of the Code and the Principal Secretary (Appeals) Revenue Department, State of Gujarat by its judgment and order dated 17-1-2005 dismissed the said revision application confirming the order passed by both the authorities below in cancelling entry No.1381 dated 13-2-1988. Being aggrieved by and dissatisfied with the aforesaid order passed by the Principal Secretary, the petitioner has preferred the present Special Civil Application under Articles 226 and 227 of the Constitution of India.

3. Ms Kruti M. Shah, learned advocate appearing on behalf of the petitioner has vehemently submitted that when the Will itself is not challenged by the heirs of the original land owner and Section 73AA of the Code would not be applicable and that the land is given by the Will, it cannot be said to get transferred as envisaged under Section 73AA of the Code and in fact there is no breach of Section 73AA of the Code and in fact in a RTS proceedings considering the dispute with regard to

revenue entry, the revenue authority has no jurisdiction to consider the breach of any other law and the entry is required to be made subject to the proceedings that may be taken by the competent authority of which breach is alleged. Therefore, it is requested to allow the present Special Civil Application.

4. Shri Dipan Desai, learned AGP while opposing the present Special Civil Application and supporting the orders passed by all the authorities below, has submitted that there are concurrent findings of fact given by all the authorities below, which are not required to be interfered with while exercising the powers under Articles 226 and 227 of the Constitution of India. He has also further submitted that when it is found that the transfer in favour of the father of the petitioner is in breach of Section 73AA of the Code, the entry has rightly been set aside and the Mamlatdar rightly passed the order to make entry with regard to registration under Section 73AA of the Code and therefore, it is requested to dismiss the present Special Civil Application.

5. Though served, nobody appears on behalf of the private respondents. Heard the learned advocate appearing

on behalf of the parties.

6. The land in question was given by way of Will in favour of the father of the petitioner and necessary entry was mutated in the revenue record vide entry No.1381 and the said entry was cancelled by the Mamlatdar by holding that there is a breach of Section 73AA of the Code. Thus, the Mamlatdar was dealing with the RTS proceedings with regard to revenue entry. As held by this court in the case of **Evergreen Apartment Cooperative Housing Society V Special Secretary (Revenue) V. Special Secretary, Revenue Department, Gujarat State** reported in 1991(1) GLR page 113 as well as in the case of **Janardhan D. Patel V. State of Gujarat** reported in 1997(1) GLR page 50 and so many other judgments that while exercising the powers by the revenue authority under the RTS proceedings, the revenue authority has no jurisdiction to consider the breach of any other law and the necessary entry is required to be mutated and it will be open for the revenue authority to refer the dispute to the competent authority of which the breach is alleged. However, the revenue authority is required to make necessary entry in the revenue record. Even otherwise, the revenue entry in the record of rights does not confer any right, title or interest and it is only for the

purpose of recovery of revenue, who established prima facie possession. Considering the aforesaid decisions, all the authorities below have erred in cancelling the entry No.1381 dated 13-2-1988 on the ground that there is a breach of Section 73AA of the Code and the same are required to be quashed and set aside. However, the said entry would be subject to the decision that may be taken by the appropriate authority with regard to alleged breach of Section 73AA of the Code by the appropriate authority and by referring this entry, it may not be construed that this court has opined that the same is not in breach of Section 73AA of the Code. It will be open for the appropriate authority to initiate the proceedings for alleged breach of Section 73AA of the Code. If the authority is of the opinion that by the aforesaid transfer, there is a breach of Section 73AA of the Code, if permissible now, and as and when such proceedings are initiated, the same may be dealt with in accordance with law and on merits. However, the necessary entry is required to be restored.

7. For the reasons as stated above, the petition succeeds. The judgment and order passed by the Principle Secretary (Appeals), Revenue Department, State of Gujarat dated 17-1-2005 passed in Revision Application No.52 of

1995 as well as the order passed by the Collector, Surat dated 25-4-1995 passed in RTS Appeal No.83 of 1993 cancelling the revenue entry No.1381 dated 13-2-1988 are hereby quashed and set aside and revenue entry No.1381 dated 13-2-1988 are hereby restored subject to the observations made hereinabove. Rule is made absolute to the aforesaid extent. However, there will be no order as to costs.

(M.R.SHAH,J.)

shekhar/-